U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: 08/12/99
Case No.: **1999 INA 173**

In the Matter of:

NEIGHBORHOOD TAX RETURN SPECIALIST, Employer,

on behalf of

KNOPFLI FOTOW AYUK, Alien,

Certifying Officer: Hon. R. E. Panati, Region III
Appearance: J. O. A. Moses, Esq., of Washington, D.C., for the Employer and Alien.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that NEIGHBORHOOD TAX RETURN SPECIALIST ("Employer") filed on behalf of KNOPFLI FOTOW AYUK ("Alien") under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

the purpose of performing skilled or unskilled labor is ineligible for labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.[2]

STATEMENT OF THE CASE

On March 2, 1998, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Accountant" in its Accounting Firm. Employer described the Job Duties as follows:

> Accounts Receivable, Accounts Payable, Assist in financial statement preparation, Payroll, Responsible for taxes, (individual & corporation). Effective Communication in English and most importantly in African Language. Also knowledge of oracle and macro applications.

AF 21, box 13. (Copied verbatim without change or correction.) Based on the Employer's description of the duties of the Job to be Performed, the position was classified as an Accountant under DOT Occupational Code No. 160.162-010.[3] Employer stated as its Other Special Requirements: "Must understand tax laws," "Macro Applications," "GAAP & GAAS Rules," "Peoples skills, client interaction a must." The Employer requirement for Education was a BSC or baccalaureate degree in Science with Accounting as the Major Field of Study. It also required training in Tax Preparation, and three years of experience in the Job Offered. *Id*., boxes 14, 15. This was a forty hour a week job from 11:00 AM to 07:00 PM, with no provision for overtime at an annual salary of $43,000. *Id*., boxes 10 -12. Although three U. S. workers applied for the Job Offered, all of them were rejected.

Notice of Findings. The Certifying Officer ("CO") issued a Notice of Findings ("NOF") on December 23, 1998. proposing to deny certification. AF 17. (1) The CO found that certain job requirements were unduly restrictive because the knowledge, skills or abilities involved could be

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[2]Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[3]160.162-018. **ACCOUNTANT** (profess. & kin.) Applies principles of accounting to analyze financial information and prepare financial reports: Compiles and analyzes financial information to prepare entries to accounts, such as general ledger accounts, documenting business transactions. Analyzes financial information detailing assets, liabilities, and capital, and prepares balance sheet, profit and loss statement, and other reports to summarize current and projected company financial position, using calculator or computer. Audits contracts, orders, and vouchers, and prepares reports to substantiate individual transactions prior to settlement. May establish, modify, document, and coordinate implementation of accounting and accounting control procedures. May devise and implement manual or computer-based system for general accounting. May direct and coordinate activities of other accountants and clerical workers performing accounting and bookkeeping tasks. *GOE: 11.06.01 STRENGTH: S GED: R5 M5 L3 SVP: 8 DLU:88*

obtained in a short period of on-the-job training. Specifically, the CO found the job requirements of knowledge of Oracle and macro applications, GAAP & GAAS rules, WordPerfect, and Spread Sheet were unduly restrictive. The CO said the NOF could be rebutted by submitting evidence that the restrictive requirements were common to the industry, by deleting the restrictive requirements, or by establishing that the restrictive requirements arose from a business necessity. If the Employer did not or could not prove that the restrictive requirements were common to the industry and it did not wish to delete the unduly restrictive requirements, the Employer could offer proof of their business necessity. To establish business necessity, the NOF told the Employer it must demonstrate both that

> 1. The job requirements bear a reasonable relationship to the occupation in the context of the Employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.
>
> -AND-
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> 2. The job as currently described **existed before the alien was hired.** You rebuttal must prove that the job existed and was previously filled with the same job duties and requirements before the alien was hired. Documentation must include, but is not limited to, position descriptions, organizational charts, payroll records, resumes of former incumbents, etc. that establish that the position and its present requirements existed before the alien was hired. If the job/requirements did not exist prior to the hiring of the alien, then you must document that a major change in your business operation caused the job to be created after the alien was hired.

(2) Citing 20 CFR §§ 656.20(c)(8) and 656.21(b)(6), the NOF said the Employer had failed to show good faith efforts to recruit U. S. workers, explaining

> The employer states that telephone calls were made to two U. S. applicants in order to schedule them for an interview. Although telephone calls were unsuccessfully placed to U.S. applicants, no certified mailing or other attempts to contact the applicants were made. An employer who does no more than place unanswered phone calls and has not followed such attempt with a certified letter has failed to make the minimally acceptable effort.

AF 17-19. (Both quotations copied verbatim without change or correction.)

Rebuttal. On January 25, 1999, the Employer submitted its rebuttal. AF 08-16. The rebuttal consisted of a letter from Employer, copies of certified mail receipts dated January 12, 1998, and an argument by Employer's counsel. Employer argued in support of its business necessity for the restrictive requirements, citing the needs of its operation. Employer said that one applicant rejected the job because the salary was too low, and the Employer reiterated the statement in its recruitment report at AF 30 that two of the US applicants did not return telephone

calls. AF 08. The Employer explained that it was expanding by soliciting government contracts from the Federal Housing Administration, the Department of Housing and Urban Development, and other public and private sources of a comparable nature. The work it was seeking demanded a higher level of expertise than it currently was able to provide in order to participate in the bidding for such contracts. AF 10-11. Employer did not, however, submit a business plan to describe the new business it proposed to seek, it did not offer evidence of its existing capacity and proposed future capacity to expand to handle to expected new work, and it did not offer evidence that it had the financial resources to fund the proposed business expansion.[4]

Final Determination. On February 2, 1999, the CO's Final Determination denied certification. The CO found that the Employer failed to prove that its unduly restrictive job requirements were those normally required for the performance of the job in the United States or that such requirements arose from business necessity. The CO again said such skills could be learned in a short period of on-the-job training. The CO rejected Employer's attempt to contact the US workers after the NOF was issued, adding that this was insufficient to establish that US workers are not available. The CO concluded that the Employer failed to sustain its burden of proof to show that US workers were not able, willing, qualified, or available for this job opportunity. As the Employer's failure to provide lawful, job-related reasons for rejecting U. S. workers at the time of initial referral violated Federal regulations, the CO denied certification.

DISCUSSION

Burden of proof. Noting that the denial of alien labor certification in this case was based on the CO's finding that the Employer failed to sustain this burden of proof, the Panel observes that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services.[5] 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The sc5ope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants:

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[4] As the NOF suggested, such documentation could have included position descriptions, organizational charts, payroll records, resumes of current workers, etc., to establish that the proposed position was a *bona fide* business necessity after the expansion that followed the major change in the business operation which required the creaton of this new position.

[5] The legislative history of the 1965 amendments to the Immigration and Nationality Act clearly shows that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334. Moreover, since the Employer applied for alien labor certification under this exception to the far reaching limits of the Immigration and Nationality Act on immigration into the United States, which Congress adopted in the 1965 amendments, the Panel's deliberations concerning the award of alien labor certification are subject to the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... .

Employer's recruiting effort. The Employer's efforts to contact two apparently qualified U. S. workers clearly were insufficient. AF 30. Its rebuttal did not contradict the admission that the Employer limited its initial recruiting effort to the unanswered telephone calls, and that it did nothing more than make such telephone calls in its efforts to contact U. S. workers seeking the job offered in the advertisements published for its Application. AF 08.

It is well established that in order to prove good-faith recruitment an employer has an obligation to try alternative means of contact. **Yaron Development Co., Inc.**, 98 INA 178 (Apr.19, 1991)(*en banc*).[6] The evidence of the Employer's unsuccessful attempts at telephone contact, without more, was not sufficient to establish that it made a good faith recruiting effort in this case. This Employer has failed to be guided by the reasons for the denial of certification in **Allcity Auto Repairs**, 91 INA 008 (Mar. 24, 1993), where the employer left only an unanswered message and in **Gilliar Pharmacy**, 92 INA 003 (Jun. 30, 1993), where that employer made only unanswered phone calls and never mailed letters to the job seekers. Moreover, the Employer's belated Certified Mail letters, which it did not send out until after it received the NOF, were evidence of its awareness that where its initial attempts to reach the job applicants by telephone were not successful, a reasonable recruiting effort would have required it to attempt an alternative method of contact, such as mail. **Delmonico Hotel Co.**, 92 INA 324 (Jul. 20, 1993); **Phototypes, Inc.**, 90 INA 063 (May 22, 1991).

Summary. The CO's NOF was explicit, as it distinctly told the Employer that the effort to recruit U. S. workers for the position, as reported in the recruitment report, was insufficient and required further proof that no U. S worker was able, willing, qualified, and available at the time the position was advertised. The rebuttal offered no further evidence of Employer's recruiting effort, apparently because none existed.

Since the Employer failed to sustain its burden of proof as to its efforts to recruit U. S. workers for this job, it is not necessary for the Panel to address deficiencies in its proof of the business necessity of the unduly restrictive hiring criteria. As the Employer's admissions in AF 30 and in its rebuttal were persuasive evidence that it failed to make a *bona fide* effort to determine the availability of workers able, willing qualified, and available for this position, the Panel concludes that sufficient evidence of record supported the denial of certification by the Certifying

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[6] See also **L.G. Manufacturing, Inc.**, 90 INA 586 (Feb. 5, 1992); and see **Ceylion Shipping, Inc.**, 92 INA 322 (Aug. 30, 1993); **Roma Ornamental Iron Works, Inc.**, 92 INA 394 (Aug. 26, 1993); **Delmonico Hotel Co.**, 92 INA 324 (Jul. 20, 1993); **William Martin**, 92 INA 249 (Jun. 2, 1993); **Surrey Transportation, Inc.**, 92 INA 241 (Jun. 2, 1993); **Warmington Homes**, 91 INA 237 (Mar. 22 1993); **Wells Laboratories, Inc.**, 92 INA 162 (Mar. 12, 1993); **Almond Jewelers, Inc.**, 92 INA 048 (Mar. 8, 1993); **Fragale Baking Co.**, 92 INA 064, 92 INA 065 (Feb. 23, 1993); **MVP Corp.**, 92 INA 058 (Feb. 1, 1993).

Officer in this case.

ORDER

The denial of alien labor certification by Certifying Officer is hereby affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: 1999 INA 173
NEIGHBORHOOD TAX RETURN SPECIALIST, Employer,
KNOPFLI FOTOW AYUK, Alien,

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner

Date: June 9, 1999